Supreme Court, U.S.
FILED
951505 MAR 18 1996
OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

October Term, 1995

Louise Bass, Surviving Spouse of Kenneth Bass, Deceased, Maurice Bass and Christopher Bass,

Petitioners,

vs.

National Super Markets, Inc.,

Respondent.

Petition for Writ of Certiorari to
The Missouri Supreme Court

PETITION FOR WRIT OF CERTIORARI

Edward Deghroony
(Counsel of Record)
Leonard P. Cervantes
1007 Olive, 4th Floor
St. Louis, MO 63101
(314) 621-6558
Counsel for Petitioners

60 pp

QUESTIONS PRESENTED FOR REVIEW

This is a wrongful death case arising out of an incident on September 4, 1987, at a supermarket operated by National Supermarkets, Inc. ("Respondent" or "National"), in which Kenneth Bass, Plaintiffs' decedent ("Bass"), was shot and killed. Louise Bass, Maurice Bass and Christopher Bass, Bass' survivors ("Petitioners") submitted their case on the theory that Respondent negligently failed to provide adequate security to the store. Respondent asserted the affirmative defense that although Bass worked for another employer, he was Respondent's statutory employee under Section 287.040 R.S.Mo. 1994 of the Missouri Workers' Compensation law and that the work performed by Bass was part of Respondent's usual business and therefore, Petitioners did not have a civil cause of action against National as the statutory employer and that their only remedy against National was Workers' Compensation.

On August 20, 1993, after a two-week jury trial, the jury found in favor of Petitioners on their negligence claim and against Respondent on its statutory employee defense and returned a verdict in favor of Petitioners in the amount of $3,000,000.00. On November 24, 1993, the trial court granted Respondent's Motion for Judgment Notwithstanding the Verdict, setting aside the jury's verdict and entering judgment in favor of Respondent based on the statutory employee defense. The Court denied Respondent's Motion for New Trial. On March 7, 1995 the Missouri Court of Appeals reversed the trial court and reinstated the verdict in favor of Petitioners, ruling that it was a question of fact for the jury as to whether Bass was performing work which was part of Respondent's usual or ordinary business. The Missouri Supreme Court accepted the case for review and on November 21, 1995 affirmed the judgment of the trial court reversing the jury's verdict and entering judgment for Respondent. The Court adopted a new statutory employee test, ruling that Bass was Respondent's statutory employee as a matter of law. Petitioners' motion for rehearing was denied by the Missouri Supreme Court on December 19, 1995.

The questions thereby arising are:

1) Whether the Missouri Supreme Court may substitute its judgment and ignore evidentiary facts considered by the jury, contravening a conclusion reached by a jury, in violation of the United States Constitution's Seventh Amendment right to a jury trial and Fourteenth Amendment rights to procedural and substantive due process.

2) Whether the Missouri Supreme Court denied Fourteenth Amendment rights to substantive and procedural due process by applying its new statutory employee test to the case at bar and in not giving its decision prospective-only application to avert injustice or hardship; and whether the Missouri Supreme Court's opinion conflicts with and violates the holding of the United States Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97, 92, S.Ct. 349 (1971) because the Missouri Supreme Court's decision herein established a new principle of law by overruling clear past precedent; the purpose and effect of the newly announced rule will not be significantly enhanced or retarded by retrospective operation; and a balancing of the interests and hardships which would result from the imposition of the court's new rule would result in substantial hardship to Petitioners.

LIST OF THE PARTIES

The parties to the proceeding before this court are:

Petitioners:	Louise Bass, Surviving Spouse of KENNETH BASS, Deceased, Maurice Bass and Christopher Bass
Respondent:	National Super Markets, Inc.

TABLE OF CONTENTS

Questions Presented for Review i

List of the Parties iii

Table of Authorities v

Opinions Below 2

Jurisdiction 2

Constitutional Provisions and Statutes 3

Statement of the Case 3

Reasons for Granting the Writ 9

Conclusion 15

Appendix A-1

TABLE OF AUTHORITIES

Cases:	Pages
Bass et al., v. National Super Markets, Inc., Slip Opinion 77915 (Mo banc) (Decided November 21, 1995).	7, 13
Bass et al., v. National Super Markets, Inc., Slip Opinion No. 65169 (Mo. E.D.) (Decided March 7, 1995).	5, 6, 7
Walton v. United States Steel Corp., 362 S.W.2d 617, 621 (Mo. 1962).	8, 10
Chevron Oil Co. v. Huson, 404 U.S. 97, 92, S.Ct. 349 (1971).	9, 12
Sippel v. Custom Craft Tile, Inc., 480 S.W.2d 87 (Mo.App. 1972).	10
Sheffield Steel Corp. v. Vance, 236 F.2d 928, 931-32 (8th Cir. 1956).	10
Ybarra v. Burlington Northern, Inc. 689 F.2d 147, 150 (8th Cir. 1982).	11
Sumners v. Sumners, 701 S.W.2d 720, 723 (Mo. banc 1985).	12, 13
Wooten Youthcraft Mfg. Co. 312 S.W.2d 1 (Mo. 1958).	13
Huff v. Union Electric, 598 S.W.2d 503 (Mo. App. 1980).	14

No.

In the

Supreme Court of the United States

October Term, 1995

Louise Bass, Surviving Spouse of Kenneth Bass, Deceased, Maurice Bass and Christopher Bass,

Petitioners,

vs.

National Super Markets, Inc.,

Respondent.

Petition for Writ of Certiorari to The Missouri Supreme Court

---

PETITION FOR WRIT OF CERTIORARI

The Petitioners, LOUISE BASS, MAURICE BASS and CHRISTOPHER BASS, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Missouri Court Supreme Court, entered in the above proceeding on November 21, 1995. Petitioner's Motion for Rehearing by the Missouri Supreme Court was denied on December 19, 1995.

OPINIONS BELOW

The opinion of the Circuit Court of the City of St. Louis State of Missouri was entered on November 24, 1993 and is reprinted as Appendix F.

The opinion of the Missouri Court of Appeals, Eastern District was entered on March 7, 1995 and is reprinted as Appendix E.

The opinion of the Supreme Court of Missouri was entered on November 21, 1995 and is reprinted as Appendix D.

The order from the Supreme Court of Missouri denying Petitioners' Motion for Rehearing was entered on December 19, 1995 and is reprinted as Appendix A.

JURISDICTION

This Petition seeks review of a decision of the highest court of the State of Missouri wherein Motion for Rehearing by the Supreme Court was denied on December 19, 1996. This application was submitted no later than 90 days from the aforesaid date.

Jurisdiction is substantially grounded upon Petitioners' claim of denial to a jury determination of the facts and therefore a denial of rights, privileges and immunities granted by the 7th and 14th Amendments to the United States Constitution.

Jurisdiction is invoked pursuant to 28 U.S.C. Section 1257 (a) in that this petition seeks review of a final judgment rendered by the highest court of a State.

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitutional Provisions:
U.S. Const. amend. VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

U.S. Const. amend. XIV, Section 1.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes:
28 U.S.C. Section 1257(a)

STATEMENT OF THE CASE

This is a wrongful death case based upon negligent failure to provide adequate security. Louise Bass, Christopher Bass and Maurice Bass are Plaintiffs-Petitioners ("Petitioners"). National Supermarkets, Inc., is Defendant-Respondent ("Respondent" or "National"). Plaintiffs' wrongful death action arose out of an incident which occurred on September 4, 1987, at the National Supermarket located at 4331 Natural Bridge, St. Louis, Missouri ("Natural Bridge store"). Kenneth Bass, Plaintiffs' decedent ("Bass"), was shot and killed during a robbery there. At the time, Bass was employed by Building Butlers, Inc. ("BBI"), performing specialized polishing, buffing, waxing and stripping services at National's supermarket after the close of National's normal business.

Petitioners alleged in their Petition that National negligently failed to provide adequate security at its Natural Bridge store on the night Bass was shot and killed. At the time Bass was killed, National had hired Barrington Bryce Detective Agency Inc. to provide security for the Natural Bridge store. Two guards were employed at the store until closing at 10:00 p.m. Between 10:00 p.m. and 11:00 p.m., only one guard secured the store. The store had closed circuit television cameras to watch for shoplifting inside the store. However, the store did not have closed circuit television cameras to monitor the entrances or exits to the store after closing. The store was not equipped with a panic alarm system. The store safe was equipped with a silent alarm but it was not turned on at the time of Bass' death.

National's usual security procedure was to have all employees leave at the same time once all the customers left and the store finally closed. At the time, the procedure called for the silent alarm to be set, which would be triggered within a matter of minutes if the store doors were not locked behind the employees.

On the night in question, National deviated from this procedure. A stock boy, Michael Marr, was ready to leave a few minutes earlier than the rest of the other employees. Store manager, Harold Meyer, requested security guard, David Spahn, to unlock the doors to let out the stock boy. When the doors were unlocked, the assailants gained entrance to the store, robbed the store and shot and killed several of the people inside the store, including Bass. The St. Louis Medical Examiner determined that Bass died of a gunshot wound to the head.

National sought to avoid liability by raising the affirmative defense that Bass was its statutory employee pursuant to Section 287.040 R.S.Mo., 1994. National claimed that under the Missouri Workers' Compensation statute, Bass should be considered its employee "in law" even though Bass was not National's employee "in fact" and that applying Section 287.040

R.S.Mo., 1994, Bass' survivors were limited to asserting a workers' compensation claim against National, even though they had already settled their claim with Building Butlers, Inc. If Bass were National's statutory employee, Plaintiffs could not assert a civil cause of action against National. National asserted that Bass was performing work which was part of its usual business, under contract and on its premises. Petitioners denied that Bass was a statutory employee or National or that buffing, polishing waxing and stripping floors was part of National's usual or ordinary business.

Kenneth Bass had been working for BBI for approximately two weeks. He had been performing stripping services for BBI at the Jewish Community Center. Bass had worked approximately three nights at National. He was transferred to the National store to help complete the stripping job there. National employees did not lay finish or wax the floors. National employees never stripped the floors. National conceded that it did not do stripping work at any of its stores. Furthermore, according to Louise Bass, her husband informed her that he would be stripping the floor at the National store on the night of his death.

The jury determined the negligence issue and statutory employee defense in favor of Petitioners and against Respondent, returning a verdict for Petitioners in the sum of Three Million Dollars ($3,000,00.00). On November 24, 1993, the trial court granted Respondent's Motion for Judgment Notwithstanding the Verdict on the issue of the statutory employee defense and entered judgment in favor Respondent. The Court denied Respondent's Motion for New Trial.

The Missouri Eastern District Court of Appeals issued its opinion on March 7, 1995 reversing the trial court and remanding the case with instructions to enter judgment in favor of Petitioners in accordance with the jury verdict. The Eastern District found that the statutory employee issue was question of fact properly decided by the jury. The Missouri Court of Appeals viewed the

evidence in the light most favorable to Petitioners and determined:

> "Here, there was substantial evidence that decedent performed the specialized work of scrubbing and buffing the floor, and of stripping and waxing it. When he scrubbed and buffed the floor, he used a propane-powered buffer owned, not by National, but by BBI. National employees at the store did not use, any were not trained to use, the buffer. Decedent did not work in conjunction with National's own employees when he scrubbed and buffed the floor; and National employees did not perform these same functions. Compare McGuire, 756 S.W.2d at 533 (temporary worker hired as "sorter" was a statutory employee where other "sorters" worked at the plant and performed the identical task of sweeping the floor as one of their duties). Decedent worked during the night when the store was closed to the public, so that his work would not interfere with the day-to-day operation of the store. See Wooten, 312 S.W.2d at 3. He did not perform routine, general cleaning, the type of cleaning performed by National employees during the day. His job specifically included scrubbing and buffing the floor, utilizing a particular program of floor care with several defined steps. It is inconclusive that at the time he was killed he may have been merely sweeping the floor, because that was a requisite step in the PEP program of floor care.
>
> In addition, there was evidence that decedent was stripping the floor at the store on the night of his death. The process of stripping required special chemicals and utilized the machinery in a particular fashion. Stripping was done only periodically. Stripping was therefore a specialized job, not routinely performed by National's in-house employees.
>
> From these facts and the inferences therefrom, a

> jury reasonably could conclude that the nature of decedent's duties did not warrant his characterization as a statutory employee. The trial court improperly granted judgment n.o.v. in favor of National. Plaintiffs' point on appeal is granted." Slip Opinion E.D. No. 65169 at PP. 8-9.

Thereafter, the Supreme Court accepted National's application for transfer. On November 21, 1995 The Missouri Supreme Court affirmed the judgment of the trial court and ruled that decedent was National's statutory employee as a matter of law.

The Missouri Supreme Court in its opinion, announced a new Missouri test to be applied when deciding the putative statutory employer's "usual business". Bass et al., v. National Super Markets, Inc., Slip Op. 77915 (Decided November 21, 1995). According to the Court's holding, the putative employer's "usual business" is defined as those activities (1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement. Bass, Slip Opinion at 9.

The Court took judicial notice of the regulations of the Department of Health which requires that the "cleaning of floors, walls and ceilings shall be done as often as is necessary." 19 CSR 20-1.020(23) (1992). Bass at 10. The Court then concluded that the stripping and waxing of National's floors was required by the Department of Health Regulations thereby making the work Bass was performing at the time of his death within the usual course of National's business.

This conclusion ignored the evidence considered by the jury and cited in the Court of Appeal's opinion concerning the work duties of Bass, thereby depriving Petitioners' of the right to

a jury determination of this question of fact.

The Department of Health merely requires the cleaning of floors. It does not require that the floors be stripped or kept in highly glossed and polished condition. The work performed by Bass was not required by the Department of Health and therefore, the Court erroneously concluded that the work performed by Bass was within National's usual course of business.

The Missouri Supreme Court has defined the appropriate standard of review of the statutory employee defense in Walton v. United States Steel Corp., 362 S.W.2d 617, 621 (Mo. 1962). It stated that a court should never withdraw a question from the jury, unless all reasonable men, in the honest exercise of a fair and impartial judgment, would draw the same conclusion from the facts that condition the issue.

The Missouri Supreme Court in the instant case ignored the facts considered by the jury and the Court of Appeals in the case at bar. Even under the Court's newly announced guidelines on the definition of "usual course of business" Bass was not performing work within the usual course of National's business and, therefore, Bass was not the statutory employee of National. It was a question of fact for the jury as to whether stripping and waxing was part of the usual business of National.

As the facts cited in the Court of Appeals opinion indicate, Petitioners presented sufficient evidence in the eyes of the jury for it to render a verdict in favor of Petitioners. The Missouri Supreme Court through its holding has violated the Seventh and Fourteenth Amendments to the United States Constitution by substituting its judgment for the jury's finding and ignoring facts considered by the jury, thereby depriving Petitioners of their right to a jury determination and procedural and substantive due process as guaranteed under the United States Constitution.

The Missouri Supreme Court further deprived Petitioners

of their United States Constitutional rights by not giving its decision prospective-only application to avert injustice or hardship under the United States Supreme Court's analysis in Chevron Oil Co. v. Huson, 404 U.S. 97, 92, S.Ct. 349 (1971) because the Missouri Supreme Court's decision herein established a new principle of law by overruling clear past precedent.

Following the adverse opinion of the Missouri Supreme Court, Petitioners filed their Motion for Rehearing asserting that the court's opinion deprived them of their constitutional right to a jury trial and procedural and substantive due process as guaranteed by the United States Constitution. Petitioners' Motion for Rehearing was denied by the Missouri Supreme Court on December 19, 1995.

Petitioners now submit their petition for writ of certiorari to the United States Supreme Court for proper review of their case.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES SUPREME COURT IS VIGILANT TO EXERCISE ITS POWER OF REVIEW IN ANY CASE WHERE IT APPEARS THAT THE LITIGANTS HAVE BEEN IMPROPERLY DEPRIVED OF THEIR RIGHT TO A JURY DETERMINATION AND SUBSTANTIVE AND PROCEDURAL DUE PROCESS.

In the present case, the Missouri Supreme Court has effectively eliminated the traditional role of a jury in any case involving injury to an employee who performs work on the premises of one who is not his employer "in fact." The court has unjustly failed to uphold a jury verdict supported by sufficient factual evidence and ignored evidence considered by the jury and cited in the appellate court's opinion. In addition, the court has without proper discretion replaced its judgment for that of the jury's, denying Petitioners' constitutional rights to a jury trial and

substantive and procedural due process.

The Missouri Supreme Court defined the standard of review of the statutory employee defense in Walton v. United States Steel Corp., 362 S.W.2d 617, 621 (Mo. 1962) when it stated:

> **The defense that plaintiff was a statutory employee and hence could not maintain an action at common law is an affirmative one and the burden of pleading and proving that defense rests upon the defendant.** [Citation omitted]
>
> **[A] court should never withdraw a question from the jury, unless 'all reasonable men, in the honest exercise of a fair and impartial judgment, would draw the same conclusion from the facts that condition the issue.**
>
> **Where there is uncertainty arising "from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."** [Citation omitted]. **Also, in the ruling the question we will view the evidence in the light most favorable to plaintiff and will disregard defendant's evidence unless it aids plaintiff.** Id. at 621. [See also Sippel v. Custom Craft Tile, Inc., 480 S.W.2d 87 (Mo.App. 1972)].

In Sheffield Steel Corp. v. Vance, 236 F.2d 928, 931-32 (8th Cir. 1956), deciding whether plaintiff was a statutory employee, the Court affirmed plaintiff's judgment and stated:

> **Unless no room for reasonable difference in a judgment exists, the question is**

> **primarily one for appraisal and resolution by the trier of the facts upon all the elements of the situation presented.** Id. at 932.

In the instant case, it is apparent that the Missouri Supreme Court violated the standard of review and considered National's evidence concerning rules and regulations regarding the cleaning of supermarkets. Even considering this evidence, all reasonable minds could not conclude that Bass' performance of specialized polishing, buffing, waxing and stripping was essential to complying with the laws or was part of the usual business of National.

In reviewing a lower court's ruling on a Respondent's motion for judgment notwithstanding the verdict the reviewing court is not free to weigh the evidence, pass on the credibility of witnesses or substitute its judgment for that of the jury. Ybarra v. Burlington Northern, Inc. 689 F.2d 147, 150 (8th Cir. 1982).

By its consideration of Respondent's evidence, the Missouri Supreme Court essentially reweighed the evidence, drew inferences and substituted its judgment for that reached by the jury. In its consideration of this evidence, the court has failed to properly follow its own standard of review and thus has deprived Petitioners of their constitutional right to a jury trial and substantive and procedural due process.

Through its holding the Missouri Supreme Court has usurped a role Constitutionally granted to the jury and has substituted its own judgment for that of the jury's. As facts cited in the Missouri Court of Appeals' opinion indicate, Petitioners presented sufficient evidence for the jury to render a verdict in favor of Petitioners on the statutory employee defense. The Missouri Supreme Court through its holding and ignoring of the evidence considered by the jury and the Missouri Court of Appeals has grossly failed to effectuate the intent of the Seventh and Fourteenth Amendments to the United States Constitution. The Missouri Supreme Court has denied Petitioners their right to

a jury determination and their right to substantive and procedural due process.

II. THE MISSOURI SUPREME COURT SHOULD HAVE GIVEN ITS DECISION PROSPECTIVE-ONLY APPLICATION TO AVERT INJUSTICE, HARDSHIP OR THE DENIAL OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS; AND IT OPINION IS IN CONFLICT WITH THIS COURT'S THREE-FACTOR TEST ANNOUNCED IN CHEVRON OIL CO. V. HUSON BECAUSE:

A. THE DECISION HEREIN ESTABLISHED A NEW PRINCIPLE OF LAW BY OVERRULING CLEAR PAST PRECEDENT;

B. THE PURPOSE AND EFFECT OF THE NEWLY ANNOUNCED RULE WILL NOT BE SIGNIFICANTLY ENHANCED OR RETARDED BY RETROSPECTIVE OPERATION; AND

C. A BALANCING OF THE INTERESTS AND HARDSHIPS WHICH WOULD RESULT FROM THE IMPOSITION OF THE COURT'S NEW RULE WOULD RESULT IN SUBSTANTIAL HARDSHIP TO PETITIONERS.

The United States Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97, 92, S.Ct. 349 (1971) and the Missouri Supreme Court in Sumners v. Sumners, 701 S.W.2d 720, 723 (Mo. banc 1985) clarified the principle that a court may constitutionally issue prospective-only application of its decision in order to avert injustice or hardship. A decision may be given prospective-only application if the court's decision establishes a new principle of law by overruling clear past precedent and if the purpose and effect of the newly announced rule will not be significantly enhanced or retarded by retrospective operation. The court must also balance the interests and hardships of the

parties who would be affected by the decision. Sumners at 724.

In the instant case, the first prong of the test is clearly established because the Missouri Supreme Court's decision overruled its decision of Wooten Youthcraft Mfg. Co. 312 S.W.2d 1 (Mo. 1958). The Missouri Supreme Court announced a new Missouri test to be applied when deciding the putative statutory employer's "usual business". Bass et al., v. National Super Markets, Inc., Slip Op. 77915 (Decided November 21, 1995). According to the Court's holding, the putative employer's "usual business" is defined as those activities (1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement. Bass, Slip Opinion at 9.

This new test conflicts with its earlier holding in Wooten. In Wooten, the plaintiff was employed by a cleaning company that contracted to perform janitorial services on defendant's premises after the store closed for business. The Wooten case, on facts quite similar to the facts of the instant case, held that a janitorial employee was not performing work within the usual course of the putative statutory employer. The janitorial work in Wooten was performed after hours because the janitorial services would have interfered with defendant's usual work of manufacturing women's clothing. The defendant alleged that the janitorial services provided by plaintiff were an essential part of its business because it could not conduct its manufacturing business unless the premises were kept clean. The Supreme Court in Wooten addressed defendant's contention by comparing the services provided by janitorial firms with those provided by lighting system firms. The court stated that defendant's business could not be conducted without light, yet the lighting systems employees would not be statutory employees.

The second prong of the test requires the Court to consid-

er whether the newly announced rule will be enhanced or retarded by retrospective operation. Realistically, it is doubtful that there are any pending cases in which the employee will be benefited by the Court's ruling herein. This part of the three-part test announced in Sumner should not be determinative of the issue.

The balancing of the equities, as required by the third prong of the test clearly favors Petitioners. Huff v. Union Electric, 598 S.W.2d 503 (Mo. App. 1980) properly states the reality that in modern society, the employee is the one who is likely to suffer hardship by the retroactive restriction of common law liability by extension of the statutory employment designation.

Petitioners relied on prior court rulings in the area of statutory employment. Petitioners received a substantial verdict against a wrongful death tortfeasor. Worker's compensation benefits were provided by Bass's actual employer, BBI. Accordingly, no benefit extends to Petitioners as a result of the Court's ruling herein. The only beneficiary is a wrongful death tortfeasor. On the other hand, considerable hardship is suffered by Petitioners not only by the denial of a substantial verdict, but also by the obligations of substantial litigation costs and expenses. As pointed out in Huff, the primary beneficiaries of the Court's new rule will be common law tortfeasors. The application to the case at bar of the Supreme Court's new test for statutory employment is a denial of substantive and procedural due process as required by the United States Constitution. Therefore, the Court's decision should be applied only prospectively.

CONCLUSION

For the foregoing reasons, Petitioners ask this Court to grant their Petition for Writ of Certiorari and reverse the decision of the Missouri Supreme Court.

Respectfully submitted,

Edward Deghroony
Leonard P. Cervantes
1007 Olive, 4th Floor
St. Louis, MO 63101
(314) 621-6558
(314) 621-6705 (facsimile)
Counsel for Petitioners

APPENDIX A

IN THE SUPREME COURT OF MISSOURI

December 19, 1995

Mr. Leonard P. Cervantes
1007 Olive Street, 4th Floor
St. Louis, Missouri 63101

In re: Louise Bass, et al. vs. National Super Markets, Inc.
Supreme Court No. 77915

Dear Mr. Cervantes:

This is to advise that the Court this day entered the following order in the above-entitled cause:

"Appellants' motion for rehearing overruled."

White, J., not participating.

Yours very truly,

THOMAS F. SIMON

BY /S/ Christina S. Vinson
Christina S. Vinson
Deputy Clerk, Court en Banc

cc: Edward J. Deghroony
Ronald C. Willenbrock

APPENDIX B

IN THE SUPREME COURT OF MISSOURI

No. 77915
E.D. No. 65169

LOUISE BASS, Surviving Spouse of
KENNETH BASS, et al.,
Plaintiffs-Appellants

vs.

NATIONAL SUPER MARKETS, INC.,
Defendant-Respondent.

PLAINTIFFS-APPELLANTS' MOTION FOR REHEARING

COME NOW Plaintiffs-Appellants and hereby file their Motion for Rehearing pursuant to Missouri Rule of Civil Procedure 84.17 and hereby bring to the Court's attention material matters of fact or law misinterpreted or overlooked by this Court and thereby request that this Court rehear this case, and in support thereof, state as follows:

I. THE COURT OVERLOOKED OR MISINTERPRETED MATERIAL MATTERS OF LAW OR FACT, WHICH TAKEN IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS-APPELLANTS, REQUIRE THE COURT TO RULE THAT DECEDENT KENNETH BASS WAS NOT PERFORMING WORK IN THE "USUAL COURSE OF BUSINESS" OF NATIONAL AND THEREFORE WAS NOT DEFENDANT-RESPONDENT'S STATUTORY EMPLOYEE, INCLUDING:

A. THAT ON THE NIGHT OF HIS

B. DEATH, DECEDENT, KENNETH BASS, WAS SCHEDULED TO DO STRIPPING WORK AT THE NATIONAL STORE AND NOT ROUTINE CLEANING AND THAT THE STRIPPING OF THE FLOORS AT THE NATIONAL STORE WAS NOT DONE ROUTINELY ON A REGULAR OR FREQUENT SCHEDULE, RATHER IT WAS DONE ON A "REQUEST BASIS" EVERY SIX TO NINE MONTHS.

This Court should grant Plaintiffs-Appellants Motion for Rehearing because the Court's opinion overlooks material matters of fact or law as stated in the accompanying suggestions and memorandum in support of this motion, which is incorporated herein by reference.

This Court in its opinion, announced the new Missouri test to be applied by a trial court when deciding the putative statutory employer's "usual business". *Bass et al., v. National Super Markets, Inc.*, Slip Op. 77915 (Decided November 21, 1995). According to the Court's holding, the putative employer's "usual business" is defined as those activities (1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement. *Bass*, Slip Opinion at 9.

This Court stated that Defendant-Respondent National was required to clean and sweep the floors in order to satisfy the Department of Health's regulations. The Court, however, overlooked the fact that Decedent Bass was not cleaning or sweeping the floors as may have been required by the health code, but rather was stripping the floor in preparation for the application of a wax coating. The health code does not require that National apply a shiny coat to its floors. It only requires that the floors be kept clean and free of debris. Furthermore, the stripping procedure was not routinely done on a regular and frequent schedule.

The stripping of National's floor was infrequently done and not on a regular schedule. Under the Court's newly announced guidelines on the definition of "usual course of business" Kenneth Bass was not performing work within the usual course of National's business and, therefore, Kenneth Bass was not the statutory employee of Defendant-Respondent.

II. THIS COURT SHOULD GIVE ITS DECISION IN THE CASE AT BAR PROSPECTIVE-ONLY APPLICATION TO AVERT INJUSTICE OR HARDSHIP UNDER THIS COURT'S THREE-FACTOR TEST ANNOUNCED IN *SUMNERS V. SUMNERS* WHICH FOLLOWED THE UNITED STATES SUPREME COURT'S ANALYSIS IN *CHEVRON OIL CO. V. HUSON* BECAUSE:

A. THE DECISION HEREIN ESTABLISHED A NEW PRINCIPLE OF LAW BY OVERRULING CLEAR PAST PRECEDENT;

B. THE PURPOSE AND EFFECT OF THE NEWLY ANNOUNCED RULE WILL NOT BE SIGNIFICANTLY ENHANCED OR RETARDED BY RETROSPECTIVE OPERATION; AND

C. A BALANCING OF THE INTERESTS AND HARDSHIPS WHICH WOULD RESULT FROM THE IMPOSITION OF THE COURT'S NEW RULE WOULD RESULT IN SUBSTANTIAL HARDSHIP TO PLAINTIFFS-APPELLANTS.

The Court should give prospective-only effect to the decision herein under this Court's three-factor test announced in *Sumners v. Sumners* and the United States Supreme Court's constitutional analysis in *Chevron Oil Co. v. Huson*. This Court's decision in *Bass* established a new principle of law by overruling clear past precedent. The purpose and effect of the newly announced rule will not be significantly enhanced or retarded by retrospective operation. In balancing the interests and hardships which would result from the imposition of the Court's new rule, substantial hardship would result to those, such as Plaintiff's herein, who may have relied upon the older rulings.

III. THE COURT'S DECISION DEPRIVES PLAINTIFFS-APPELLANTS OF THEIR CONSTITUTIONAL RIGHT TO A JURY TRIAL IN VIOLATION THEIR PROCEDURAL DUE PROCESS AND SUBSTANTIVE DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Court's opinion in *Bass* deprived Plaintiffs-Appellants of their Constitutional right to a jury trial. The Court's decision makes the determination of statutory employee a matter for the trial court and removes it from the hands of the jury. This deprivation violates Plaintiffs-Appellants' substantive and procedural due process as guaranteed by the Fourteenth Amendment of the United States Constitution.

IV. THE DESIGNATION OF A "STATUTORY EMPLOYEE" IS AN IMPROPER CLASSIFICATION

WHICH DENIES PLAINTIFFS-APPELLANTS EQUAL PROTECTION UNDER THE LAW AS GUARANTEED BY THE UNITED STATES CONSTITUTION.

The Court's designation of a "statutory employee" creates a classification of individual which exempts certain parties, including Defendant-Respondent, from tort liability and deprives Plaintiffs-Appellants of their right to pursue their cause of action against Defendant-Respondent in violation of the Equal Protection Clause of the United States Constitution.

WHEREFORE, for the reasons stated above and in the accompanying Suggestions and Memorandum in Support of Plaintiffs-Appellants' Motion For Rehearing, Plaintiffs-Appellants hereby request that this Court grant their Motion for Rehearing.

CERVANTES & ASSOCIATES

By /s/ Mario G. Silva
Leonard P. Cervantes, #25043
Mario G. Silva, #39134
1007 Olive, Fourth Floor
St. Louis, MO 63101
314-621-6558
Attorneys for Plaintiff(s)

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon Ms. Ann Marie Piana, National Supermarkets, Inc., P. O. Box 7123, St. Louis, MO 63177 via facsimile, and hand-delivered to Mr. Ron Willenbrock, Amelung, Wulff & Willenbrock, 17th Floor Executive Office Building, 515 Olive Street, St. Louis, Missouri 63101-1839 on December 6, 1995.

By /s/ Mario G. Silva

APPENDIX C

IN THE SUPREME COURT OF MISSOURI

No. 77915
E.D. No. 65169

LOUISE BASS, ET AL.,
Plaintiffs-Appellants

vs.

NATIONAL SUPER MARKETS, INC.,
Defendant-Respondent.

PLAINTIFFS' SUGGESTIONS AND MEMORANDUM IN SUPPORT OF THEIR MOTION FOR REHEARING

I. THE COURT OVERLOOKED OR MISINTERPRETED MATERIAL MATTERS OF LAW OR FACT, WHICH TAKEN IN THE LIGHT MOST FAVORABLE TO PLAINTIFFS-APPELLANTS, REQUIRE THE COURT TO RULE THAT DECEDENT KENNETH BASS WAS NOT PERFORMING WORK IN THE "USUAL COURSE OF BUSINESS" OF NATIONAL AND THEREFORE WAS NOT DEFENDANT-RESPONDENT'S STATUTORY EMPLOYEE, INCLUDING:

A. THAT ON THE NIGHT OF HIS DEATH, DECEDENT, KENNETH BASS, WAS SCHEDULED TO DO STRIPPING WORK AT THE NATIONAL STORE AND NOT ROUTINE CLEANING AND

B. THAT THE STRIPPING OF THE FLOORS AT THE NATIONAL STORE WAS NOT ROUTINELY DONE ON A REGULAR OR FREQUENT SCHEDULE, RATHER IT WAS DONE ON A "REQUEST BASIS" EVERY SIX TO NINE MONTHS.

This Court in its opinion, announced a new Missouri test to be applied when deciding the putative statutory employer's "usual business". *Bass et al., v. National Super Markets, Inc.*, Slip Op. 77915 (Decided November 21, 1995). According to the Court's holding, the putative employer's "usual business" is defined as those activities (1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement. *Bass*, Slip Opinion at 9. In the case at bar, Kenneth Bass was not performing work routinely done on a regular and frequent schedule repeated over a relatively short span of time.

Arthur Seise, the president of Building Butlers, stated that stripping of the floors was done on a "request basis" every six to nine months. (DE T. 119, L. 5-10). Based upon Mr. Seise's testimony, stripping work was clearly not part of the agreement between BBI and National. Stripping was not routinely done on a regular and frequent schedule. Stripping work was not contemplated in the agreement between BBI and National to be repeated over a relatively short span of time. The performance of stripping work would not have required National to hire permanent employees absent the agreement.

Kenneth Bass was employed by BBI to perform specialized polishing, buffing and stripping services at the Natural Bridge store (DE. T.122, L.21-25; T.142, L.4-19). He had been working for BBI for approximately two weeks. He had been performing stripping services for BBI at the Jewish Community Center (RI. T.342, L.24-25; T.343 L.1-6). Bass had worked approximately three nights at National. (DE. T.141, L.12-16). He was transferred to the National store to help complete the stripping job there. (DE. T.141, L.21-25). National employees did not lay finish or wax the floors. (DE. T.138, L.15-20). National employees never stripped the floors. (DE. T.138, L.21-23). National conceded that it did not do stripping

work. (Summers Depo. T.102, L.9-20). Furthermore, according to Louise Bass, her husband informed her that he would be stripping the floor at the National store on the night of his death. (RI T. 343, L. 25; T. 344, L. 1-3).

This Court took judicial notice of the regulations of the Department of Health which requires that the "cleaning of floors, walls and ceilings shall be done as often as in necessary." 19 CSR 20-1.020(23) (1992). *Bass* at 10. The Court then concluded that the stripping process was part of the floor care mandated by the Department of Health thereby making the stripping process part of National's usual business.

This conclusion misinterprets the duties required of Kenneth Bass. National's store manager, Harold Meyer, testified that the propane buffer was used for a more specialized purpose than merely cleaning the floor. (RO. T. 387, L. 24 - T. 388, L. 6). The buffer was not really for cleaning; it was to make the floor look shiny. (RO. T.387, L.24-25; T.388, L.1-6).

Judge William H. Crandall in the Eastern District's opinion in this case, stated:

In addition, there was evidence that decedent was stripping the floor at the store on the night of his death. The process of stripping required special chemicals and utilized the machinery in a particular fashion. Stripping was done only periodically. Stripping was, therefore, a specialized job, not routinely performed by National's in-house employees.

Slip Opinion E.D. No. 65169 at P. 9.

The Department of Health merely requires the cleaning of floors. It does not require that the floors be stripped or kept in highly glossed and polished condition. The work performed by Kenneth Bass was not required by the Department of Health and therefore, the Court erroneously concluded that the done performed by Kenneth Bass was within National's usual course of

business.

When there is a question of fact, as there is in this case, the Missouri Supreme Court defined the appropriate standard of review of the statutory employee defense in *Walton v. United States Steel Corp.*, 362 SW2d 617, 621 (Mo. 1962) when it stated that a court should never withdraw a question from the jury, unless all reasonable men, in the honest exercise of a fair and impartial judgment, would draw the same conclusion from the facts that condition the issue.

This Court misinterpreted the facts of the case at bar. Under the Court's newly announced guidelines on the definition of "usual course of business" Kenneth Bass was not performing work within the usual course of National's business and, therefore, Kenneth Bass was not the statutory employee of Defendant-Respondent. There was a question of fact for the jury as to whether stripping was part of the usual business. This was not a question of law.

II. THIS COURT SHOULD GIVE ITS DECISION IN THE CASE AT BAR PROSPECTIVE-ONLY APPLICATION TO AVERT INJUSTICE OR HARDSHIP UNDER THIS COURT'S THREE-FACTOR TEST ANNOUNCED IN *SUMNERS V. SUMNERS* WHICH FOLLOWED THE UNITED STATES SUPREME COURT'S ANALYSIS IN *CHEVRON OIL CO. V. HUSON* BECAUSE:

A. THE DECISION HEREIN ESTABLISHED A NEW PRINCIPLE OF LAW BY OVERRULING CLEAR PAST PRECEDENT;

B. THE PURPOSE AND EFFECT OF THE NEWLY ANNOUNCED RULE WILL NOT BE SIGNIFICANTLY ENHANCED OR RETARDED BY RETROSPECTIVE OPERATION; AND

C. A BALANCING OF THE INTERESTS AND HARDSHIPS WHICH WOULD RESULT

FROM THE IMPOSITION OF THE COURT'S NEW RULE WOULD RESULT IN SUBSTANTIAL HARDSHIP TO PLAINTIFFS-APPELLANTS.

The United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92, S.Ct. 349 (1971) and the Missouri Supreme Court in *Sumners v. Sumners*, 701 S.W.2d 720, 723 (Mo. banc 1985) clarified the principle that a court may constitutionally issue prospective-only application of its decision in order to avert injustice or hardship. A decision may be given prospective-only application if the court's decision establishes a new principle of law by overruling clear past precedent and if the purpose and effect of the newly announced rule will not be significantly enhanced or retarded by retrospective operation. The court must also balance the interests and hardships of the parties who would be affected by the decision. *Sumners* at 724.

The first prong of the *Sumners* test is clearly established because the Court's decision overruled its decision of *Wooten Youthcraft Mfg. Co.* 312 S.W.2d 1 (Mo. 1958). *Wooten* involved a Plaintiff who was employed by a cleaning company that contracted to perform janitorial services on Defendant's premises after the store closed for business. The *Wooten* case, on facts quite similar to the facts of the instant case, held that a janitorial employee was not performing work within the usual course of the putative statutory employer. The janitorial work in *Wooten* was performed after hours because the janitorial services would have interfered with defendant's usual work of manufacturing women's clothing. The defendant alleged that the janitorial services provided by plaintiff were an essential part of its business because it could not conduct its manufacturing business unless the premises were kept clean. The Supreme Court in *Wooten* addressed defendant's contention by comparing the services provided by janitorial firms with those provided by lighting system firms. The court stated that defendant's business could not be conducted without light, yet the lighting systems employees would not be statutory employees.

The second prong of the test requires the Court to consider whether the newly announced rule will be enhanced or retarded by retrospective operation. Realistically, it is doubtful that there are any pending cases in which the employee will be benefited by the Court's ruling herein. This part of the three-part test announced in *Sumner* should not be determinative of the issue.

The balancing of the equities, as required by the third prong of the test clearly favors Plaintiffs-Appellants. *Huff v. Union Electric*, 598 S.W.2d 503 (Mo. App. 1980) properly states the reality that in modern society, the employee is the one who is likely to suffer hardship by the retroactive restriction of common law liability by extension of the statutory employment designation

The *Bass* Plaintiffs, and other similarly situated Plaintiffs, have relied on prior court rulings in the area of statutory employment. The *Bass* Plaintiffs received a substantial verdict against a wrongful death tortfeasor. Worker's compensation benefits were provided by Bass's actual employer, BBI. Accordingly, no benefit extends to the *Bass* Plaintiffs as a result of the Court's ruling herein. The only beneficiary is a wrongful death tortfeasor. On the other hand, considerable hardship is suffered by the *Bass* Plaintiffs not only by the denial of a substantial verdict, but also by the obligations of substantial litigation costs and expenses. As pointed out in *Huff*, the primary beneficiaries of the Court's new rule will be common law tortfeasors. The Court's decision should be applied only prospectively as set forth by the Supreme Court in *Sumners*.

CERVANTES & ASSOCIATES

By /s/ Mario G. Silva
Mario G. Silva, #13834
Leonard P. Cervantes, #25043
1007 Olive, Fourth Floor
St. Louis, MO 63101

314-621-6558
Attorneys for Plaintiff(s)

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing was served upon Ms. Ann Marie Piana, National Supermarkets, Inc., P. O. Box 7123, St. Louis, MO 63177 via facsimile, and hand-delivered to Mr. Ron Willenbrock, Amelung, Wulff & Willenbrock, 17th Floor Executive Office Building, 515 Olive Street, St. Louis, Missouri 63101-1839 on December 6, 1995.

By /s/ Mario G. Silva

APPENDIX D

SUPREME COURT OF MISSOURI
EN BANC

No. 77915

LOUISE BASS, ET AL.,
Plaintiffs-Appellants

vs.

NATIONAL SUPER MARKETS, INC.,
Defendant-Respondent.

Appeal from the Circuit Court
Of the City of St. Louis

Honorable Timothy J. Wilson, Judge

OPINION FILED: November 21, 1995

We granted transfer to reexamine the manner in which appellate courts of this state have made determinations of statutory employment under section 287.040, RSMo 1994. The specific issue in this case is whether the trial court properly concluded as a matter of law that section 287.040, RSMo 1994, rendered plaintiffs' decedent, who performed floor care duties as the employee of an independent contractor, a statutory employee under The Workers' Compensation Law (the "Act"). As more fully explained, we hold that the performance of routine, frequent, and regular contractual duties is within the usual business of the employer. and falls under the coverage of the Act.

Our jurisdiction is founded on article V, section 10 of the Missouri Constitution, The judgment of the trial court is affirmed.

I.

There is no dispute as to the facts in this case, only their meaning. We take the facts from the evidence the *Bass* plaintiffs offered.

In August, 1986, Building Butlers, Inc. ("BBI") orally contracted with National Supermarkets ('National") to furnish personnel and provide janitorial services at National's Natural Bridge store in St. Louis. Under the agreement, BBI personnel swept and dust mopped the floor, scraped up gum or labels stuck to the floor, scrubbed, spot mopped, and buffed the floor with a propane powered buffer every night after National closed the store. In addition to the nightly cleaning, BBI agreed to wax the floor periodically and to strip the floor and apply fresh wax at less frequent, but regular intervals.

BBI hired Kenneth Bass. On the night of September 4, 1987, BBI assigned Bass to perform the routine janitorial services required by the agreement with National at the Natural Bridge store. Between 10:00 and 11:00 p.m. that night, two men forced their way past a security guard and into National's store. During the course of the robbery, these men shot and killed several people, including Bass.

On May 4, 1988, Louise Bass, (decedent's wife, and Maurice and Christopher Bass, decedent's surviving children, filed a civil action for wrongful death against National averring that National negligently failed to provide adequate security to protect Bass. National filed a motion to dismiss for lack of subject matter jurisdiction on the grounds that decedent was its statutory employee. The trial court initially overruled the motion.

The case proceeded to trial. The jury returned a substantial verdict against National. National filed a motion for a judgment notwithstanding the verdict, renewing its argument that jurisdiction of the Bass' claim was trial court in the Labor and Industrial Relations Commission. he trial court reviewed the

evidence, concluded that it lacked subject matter jurisdiction to enter am a civil action for damages in wrongful death because Bass was a statutory employee of National subject to the compensation provided by the Act, sustained the motion and entered judgment accordingly (In appeal the Court Of Appeals, Eastern District, reversed and remanded with instructions to reinstate the verdict.

II.

A.

The common law provided an employer with several defenses to a civil claim for damages filed by an employee. Three of these, assumption of the risk, contributory negligence, and the and the employer's non-liability for acts of third parties, effectively barred the negligent employee from recovering damages in a common law action for work-related injuries in most cases. The common law permitted an injured employee to recover for work-related injuries only if he or she could prove that the accident resulted solely from the employer's negligence. See generally Arthur Larson 1, The Law of Workmen's Compensation, Section 4.30 (1952).

Responding to the common law's seeming inability to fashion a remedy to provide redress for workers injured in increasingly common industrial accidents, state legislatures adopted workers' compensation laws that imposed a statutory contractual provision on the employee-employer relationship. *Oren v. Swift & Co.*, 51 S.W.2d 59, 61 (Mo. banc 1932). The statutory contract provided a means of compensating the injured worker that, with exceptions, eliminated the common law's concerns with negligence and fault altogether, established levels of compensation and provided for administrative determinations of the nature and extent of injury, subject to judicial review.

In 1925, Missouri's legislature adopted its first workmen's compensation law, 1925 Mo. Laws 375, directing that

"[a]ll of the provisions of this act shall be liberally construed with a view to the public welfare." § 3374, RSMO 1929. Cf. § 287.800, RSMo 1994.

Appellate courts of this state have interpreted the legislature's admonition to construe the Act liberally to mean that "[t]he legislative design...was to ameliorate, in the interest of the workman and the public welfare, the losses sustained by himself and his dependents from accidental injuries received by him in the proper course of his work..." *Maltz v. Jackoway-Katz Cap Co.*, 82 S.W.2d 909, 912 (Mo. banc 1935). Further, liberal construction of the Act requires that "where a question of jurisdiction is in doubt, it should be held to be in favor of the [Labor and Industrial Relations] commission." *Ringeisen v. Insulation services, Inc.*, 539 S.W.2d 621, 626 (Mo. App. 1976).

This Court is aware that the adoption of comparative fault in *Gustafsen v. Benda*, 661 S.W.2d 119 15 (Mo. banc 1983), makes the policy rationale underlying the Act less compelling. The Court is further aware -- as this case illustrates -- that an injured worker often prefers that a jury decide liability and damage issues in a civil suit rather than submit to the statutorily imposed compensation limitations found in the Act. Nevertheless, the legislature has not altered the scope or applicability of the Act since Gustafsen, nor the requirement that courts liberally construe its provisions.

B.

The dispositive issue in this case is whether Kenneth Bass worked as a statutory employee of National under section 287.040.

Section 287.040.1 defines a statutory employee.

> Any person who has work done under contract on or about hit premises which is an operation of the usual

> business he there carries on shall be deemed an employer and shall be liable under this chapter to such contract, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

The General Assembly adopted section 287.040 to prevent employers from circumventing the requirements of the Act by hiring independent contractors to perform work the employer would otherwise perform. *Walton v. U.S. Steel Corp.*, 362 S.W.2d 617, 622 (Mo. banc 1962).

As the statute makes clear, statutory employment exists when three elements coexist: (1) the work is performed, pursuant to a contract; (2) the injury occurs on or about the premises of the alleged statutory employer; and (3) the work is in the usual course of business of the alleged statutory employer. *McGuire v. Tenneco, Inc.*, 756 S.W.2d 532, 534 (Mo. banc 1988).

The first two elements are not at issue in this case. The parties agree that National orally contracted with BBI for floor cleaning services and that Bass's death occurred on National's premises.

The third element - whether the floor cleaning services performed by BBI and Bass were within the usual course of National's business -- is the focus of the case. National contends that the care and maintenance of its floors is within the usual course of its business. The Bass plaintiffs urge that Kenneth Bass was not a statutory employee because National's usual business is to buy, sell, manufacture, process and otherwise deal in groceries, produce, meat and general merchandise. Further, they argue that BIB used specialized equipment and procedures to perform the contractual duties. Under the plaintiffs' reasoning, National is not in the floor-cleaning business said the work performed by BBI employees under BBI's contract with National lies outside National's usual business.

C.

Courts have wrestled with the meaning of the phrases "usual business" and "usual course of business' in section 287.040.1. Although the cases do not fall neatly into rigid categories, two basic, analytical constructs inform the courts' decisions. The first line of cases say that the usual business of a company encompasses all of those activities--that are essential and integral to the statutory employer's business. See, e.g., *Viselli v. Missouri Theatre Building Corp.*, 234 S.W.2d 563, 567 (Mo. banc 1930) (window washing is within the usual business of a company that rented property to commercial tenants because essential); *Wooten v. Youthcraft Manufacturing Co.*, 312 S.W.2d 1, 3 (Mo. banc 1938) (janitorial service at a clothing manufacturer formerly performed by employees not an essential part of manufacturer's trade or business when contracted to an independent contractor);[1] *March v. Bernardin*, 78 S.W.2d 706, 708 (Mo. App. 1934) (annual repair of boiler within usual business of coal mine because necessary to operation of business); *Kennedy v. J.D. Carson Co.* 149 S.W.2d 424, 428 (Mo. App. 1941) (repair of an elevator is essential and therefore within the usual business of a furniture company where exhibition, sales and delivery of furniture requires use of the elevator); *Heskett v. Central Missouri State University*, 743 S.W.2d 712, 713 (Mo. App. 1987) (preparation of food is integral part of university's activities); *Mooney v. Missouri Athletic Club*, 859 S.W.2d 7729 774 (Mo. App. 1993) (furnishing security is integral part of athletic club's operation); *Miller v. McDonnell Douglas Corp.*, 896 S.W.2d 734, 737 (Mo. App. 1995) (installation and maintenance of a telecommunications system is part of the usual

---

[1] Professor Larson describes *Wooten* as "[a] really remarkable decision" that would seem "grotesquely illiberal" the holding had not emitted a damage suit to proceed. Wooten is wrongly decided precisely because it ignores the legislature's mandate that the Act be liberally construed to provide coverage under the Act. This is so without regard to whether an underlying damage suit holds out the hope of a recovery.

course of business of an airplane manufacturer because necessary to conduct business).

A second line of cases places greater focus on the routine and frequent nature of the independent contractor's activities to determine whether the work is within the usual business of the putative employer. *See, e.g., Anderson v. Benson Mfg. Co.*, 338 S.W.2d 812, 815 (Mo. 1960) (guard services performed regularly and continuously to protect classified material within usual business); *Shaver v. First Union Realty Management, Inc.*, 713 S.W.2d 297, 300 (Mo. banc 1986) (full-time maintenance of heating and air conditioning equipment within usual business of company engaged in managing real estate); *Musielak v. International Shoe Co.*, 387 S.W.2d 217 (Mo. App. 1965) (employee of an independent contractor supplying janitorial services to a shoe manufacturer not statutory employee when removing paint from a floor in preparation for remodeling because remodeling not usually and customarily done); *Rouge v. St. Charles Speedway*, 733 S.W.2d 854, 856 (Mo. App. 1987) (even though the employer used the public address system as an integral part of its business, episodic repair of that system was not sufficient to constitute a part of the operation of speedway"s usual business); *McGuire v. Tenneco, Inc.*, 756 S.W.2d 532, 535 (Mo. banc 1988) (sweeping a warehouse Boor is within the usual business of company that operates paper recycling plant because work is regularly performed); *Taylor v. Associated Electric Cooperative, Inc.*, 818 S.W.2d 669, 671 (Mo. App. 1991) (painting water storage tanks at a coal-fired electricity generating plant is not within the usual business of a rural electric cooperative since only occasionally necessary).

The difficulties that attend holdings relying on the essential/integral test are obvious from the uneven results reached in the cases. In order to maximize profits, businesses generally limit expenditures to those. goods and services that are necessary to ongoing or planned activities. Thus, any activity undertaken or service contracted for is arguably essential and integral to the usual business of the putative employer no matter how removed

from the work its employees regularly perform its day-to-day operation.

With notable exceptions, the cases employing the essential/ integral test are older than those that use a routine/frequent analysis. It appears that the older cases are written more broadly to accommodate the common law's contributory fault system that denied recovery to any employee whose negligence contributed to his or her injury. Absent workers' compensation coverage, the employee -- and ultimately society -- bore the entire economic burden of the injury. By extending the Act's coverage to essential or integral business purposes, courts permitted compensation where it would not otherwise have existed.

The routine/frequent test is more narrow. It also has the virtue of more closely accommodating the legislature's intent in adopting section 287.040.1 -- to prevent, employers from avoiding their duties under the Act by contracting out work that their employees would normally do. And it does so without sweeping within its reach specialized or episodic work that is essential to the employer but not within the employer's usual business as performed by its employees.

Against this precedent and understanding of the legislature's purpose, we define a putative employer's "usual business" as used in section 287.040 as those activities (1) that are routinely done (2) on a regular and frequent schedule (3) contemplated in the agreement between the independent contractor and the statutory employer to be repeated over a relatively short span of time (4) the performance of which would require the statutory employer to hire permanent employees absent the agreement.

D.

When an action for damages arising from employment is filed in the circuit court, the court must decide initially whether it

or the Labor and Industrial Relations Commission has jurisdiction to address the issues raised. In determining the existence of statutory employment that would place the matter properly before the Commission, courts must consider the agreement between the putative employer and the independent contractor as a whole. The manner in which the independent contractor performed its contractual obligations is not relevant to the section 287.040 inquiry. Where the facts are not in dispute as to the nature of the agreement and the work required by it, the existence or absence of statutory employment is a question of law for the courts to decide. Only where the parties disagree as to whether the work that caused the injury was work performed under and required by the contract between the putative statutory employer and the independent contractor will a factfinder be asked to render a factual decision. Finally, until directed by the legislature to embark on another course, courts must continue to give the Act a liberal reading, deciding dose cases in favor of workers' compensation coverage.

E.

In the case sub judice and based on the evidence the Bass plaintiffs submitted, Bass worked under an oral agreement between BBI and National for routine floor maintenance. The agreement required nightly cleaning as well as periodic stripping and waxing of National's floors. This work was routinely done on a regular and frequent schedule and repeated over a relatively short span of time. Absent its contract with BBI, National would have had either to assign floor care duties to its staff or to hire a staff specifically to maintain its floors. This is because - regulations of the Department of Health, of which we take judicial notice and under which National operates, require that the "[c]leaning of floors, walls and ceilings shall be done as often as necessary." 19 CSR 20-1.020(23) (1992). We conclude, therefore, that at the time of his death Bass was performing work within the usual course of National's business. The trial court properly found Bass a statutory employee of National as a matter of law.

Ill.

The judgment of the trial court is affirmed.

_____

EDWARD D. ROBERTSON, JR. Judge

Holstein, C.J., Benton, Price, Limbaugh,
Covington, JJ., and Edwards, Sr.J., concur.
White, ., not participating because not a
member of the Court when case was submitted.

APPENDIX E

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION THREE

No. 65169

LOUISE BASS, surviving spouse of KENNETH BASS,
and MAURICE BASS and CHRISTOPHER BASS,
Surviving Children of KENNETH BASS, Deceased

Plaintiffs/Respondents

v.

NATIONAL SUPER MARKETS, INC.

Defendant/Appellant.

Appeal from the Circuit Court
of the City of St. Louis

Honorable Timothy J. Wilson

OPINION FILED: March 7, 1995

Plaintiffs, Louise Bass, Maurice Bass, and Christopher Bass, brought an action against defendant, National Super Markets, Inc., for the wrongful death of Kenneth Bass. Plaintiffs appeal from the trial court's grant of defendant's motion for judgment notwithstanding the verdict, following a jury verdict in favor of plaintiffs in the amount of $3,000,000.00. The trial court entered judgment n.o.v. on the basis that Kenneth Bass was a statutory employee of National Super Markets, Inc. (National) at

the time of his death.[1] We reverse and remand.

In determining whether plaintiffs made a submissible case, the evidence is viewed the light most favorable to the plaintiffs, giving them the benefit of all reasonable inferences drawn from the evidence in support of their cause of action. *Bizzle v. Enterprise Leasing*, 741 S.W.2d 84, 85 (Mo-App. 1987). Sustaining a motion for judgment n.o.v. should be done only when all of the evidence and the reasonable inferences therefrom are so strongly against the plaintiffs' case that there is no room for reasonable minds to differ. Id.

The evidence, viewed in this light, established that on September 4, 1987, Kenneth Bass (decedent) was employed by Building Butlers, Inc. (BBI), a company which provided janitorial services to residential, commercial, and retail customers. He was working at a National super market located at 4331 Natural Bridge in St. Louis, Missouri (store), when he was killed during a robbery.

BBI contracted with National to provide floor cleaning services at the store. One BBI employee scrubbed and buffed the floor nightly, using a method known as the Pioneer Eclipse Program (PEP), a program which utilized specific products and steps. The nightly routine included sweeping the floor; dust mopping the floor, scraping up gum or labels stuck to the floor; scrubbing the floor with an automatic scrubber; spot mopping the floor; and finally using a propane-powered buffer to shine the floor.

---

[1] In conjunction with the trial court's grant of defendant's motion for judgment n.o.v., the court dismissed plaintiffs' action without prejudice for lack of subject matter jurisdiction. See, e.g., *Mays v. Penzel Construction Company*, 838 S.W.2d. 1 (Mo. in App. E.D. 1992). Given that the trial court granted judgment n.o.v. on the ground that Kenneth Bass was defendant's statutory employee, the dismissal of plaintiffs' action necessarily followed. The salient issue, however, is the submissibility of plaintiffs' case. The parties on appeal have properly focused on the court's grant of judgment n.o.v., which we address in this opinion.

National supplied all of the mops and brooms, as well as the PEP cleaning products. BBI furnished the propane buffer, the buffer pad$, and the propane fuel for the buffer. BBI was responsible for maintaining the buffer. Although the buffer was kept at the store, it was used exclusively by BBI employees. The nightly process of cleaning the floor took about seven hours and was performed after closing hours when no customers were in the store. National did not want the buffers interfering with customers while they shopped.

In addition to the nightly floor cleaning, BBI employees waxed the floor, in some areas of the store every five to eight days and in other areas every other week. About every six to nine months, BBI employees stripped and waxed the floor. National employees did not strip, wax, or polish the floor.

BBI controlled its employees and determined which employees worked at the store. Although National informed BBI employees of specific areas of the store which required cleaning, it was within the exclusive province of BBI to hire its employees, to train them, and to fire them.

During the day; National employed about three porters to sweep the floor and mop up spills. National did not hire or train anyone to scrub and buff the floor, either during normal working hours or after the store closed. In addition to keeping the floor clean during the daytime hours of operation, the two day porters did general cleaning.

At the time of the incident, decedent had worked at the store for about three days. Prior to coming to the store, he had stripped floors for another BBI customer. Although he originally worked with the stripping crew at the store, on the night in question he was assigned to the job of scrubbing and buffing the floor.

Between 10:00 and 11:00 p.m. that night, two men forced their way past a security guard and into the store. During

the course of a robbery, they shot and killed several people, including decedent.

Louise Bass, decedent's surviving spouse, and Maurice Bass and Christopher Bass, decedent's surviving children, brought this wrongful death action against National. They alleged that National was negligent in failing to provide adequate security. National raised the affirmative defense of statutory employee as a bar to plaintiffs' common law negligence action. National argued that decedent's scrubbing, buffing, and stripping the floor constituted its usual and customary business, because it was required to keep the store clean.

After a trial, the jury returned a verdict in favor of plaintiffs in the amount of $3,000,000.00. The trial court later granted National's motion for judgment n.o.v. on the basis that decedent was a statutory employee.

On appeal, plaintiffs challenge the trial court's granting judgment n.o.v. in favor of National. The issue is whether the trial court erred in finding that decedent was National's statutory employee at the time of his death, thereby limiting his recovery to Workers' Compensation Law. Section 287.040-1., RSMO (1994) defines a statutory employee as follows:

> Any person who has work done under contract on or about his premises which is an operation of the usual business which he there carries on shall be deemed an employer and shall be liable under this chapter to such contractor, his subcontractors, and their employees, when injured or killed on or about the premises of the employer while doing work which is in the usual course of his business.

The statute establishes a constructive employment relationship. in order to extend workers' compensation coverage to employees of employers who have work done pursuant to a contract. *Tumbas v. J. L. Mason Group, Inc.*, 809 S.W.2d 188, 190 (Mo. App.

1991). Its purpose is to prevent an employer from evading workers' compensation liability by hiring independent contractors to perform the usual work his employees would otherwise perform. Id. To categorize an employee as a statutory employee, it is necessary that three elements-exist: (1) the work was performed pursuant to a contract; (2) the injury occurred on or about the premises of the statutory employer; and (3) the work was in the usual course of business of the statutory employer. Id. When attempting to determine the application of § 287.040.1, each case must be determined on its own facts and the court must recognize the real roles and relationships of the parties as they relate to the purpose of the statute. Id.

The first two elements required to establish that decedent was a statutory employee of National are not at issue in the present case. National owned the premises on which decedent was killed; and decedent's employer, BBI, contracted with National to provide floor cleaning service at the store. The salient issue focuses on the third requirement; namely, whether the floor service performed by decedent was in the usual course of National's business.

National claims that at the time of his death decedent was performing tasks which were within the usual course of its business. It alleges that cleaning the floor was an integral. and essential part of the store's operation and relies on the following facts to buttress its position: both state and federal health regulations required it to keep the floor clean; its employees performed the same work during the day; it provided all the equipment and cleaning products for use in the store, except for the equipment used in conjunction with the PEP system; and a clean store was essential to remaining competitive with other grocery stores in the community.

In *McGuire v. Tenneco, Inc.*, 756 S.W.2d 532, 533 (Mo.banc 1988), McGuire was employed by a temporary employment agency. Tenneco, which operated a paper recycling plant, requested laborers from the agency "for the following day

in anticipation of a large volume of paper products and a need for additional "sorters.'" Id. When he reported for work, McGuire was assigned to sweep paper off the warehouse floor, a job which was usually a sorter's duty. Id. McGuire was sweeping the floor when he was injured. Id. The Supreme Court of Missouri held that McGuire was a statutory employee of Tenneco because "[s]weeping the warehouse floor constitutes work which is within the usual course of Tenneco's business Id. at 536.

In *Musielak v. International Shoe Co.*, 387 S.W.2d 217, 218 (Mo. App. 1965), Musielak worked for a janitorial service which contracted with International Shoe to provide general janitorial services. An International Shoe foreman directed Musielak to clean and mop the floor of the cafeteria with a solution furnished by International Shoe. *Id.* The purpose of the work. was to remove old spots of paint from the floor, in preparation for a new tile floor as part of a remodeling project. *Id.* at 219. Musielak suffered injury when his feet came in contact with the caustic cleaning solution. *Id.* In finding that Musielak was not a statutory employee, this court reasoned:

> There is no evidence that [International Shoe] usually or customarily used such a solution to clean its floors or that it usually or customarily did the work this floor cleaning was an integral part of; i. e., laying a new floor and remodeling the cafeteria...In the instant case the transcript ...shows this work to have been incidental, auxiliary and ancillary to [International Shoe's] usual business.

Id. at 222 (citations omitted).

In *Wooten v. Youthcraft Mfg. Co.*, 312 S.W.2d 1, 2 (Mo. 1958), Youthcraft contracted with a janitorial service to provide janitorial work for its clothing manufacturing business after working hours. Youthcraft had discontinued janitorial work during working hours, because it interfered with the work of its employees. *Id.* Wooten worked with a crew that cleaned

Youthcraft's premises as well as others'. *Id.* The Supreme Court held that Wooten was not a statutory employee of Youthcraft because the janitorial work he did was not an essential part of Youthcraft's business. *Id.* at 3. It pointed to the fact that "the janitorial work was done after closing time because if done during working hours, it interfered with the proper operation of [Youthcraft's] business." *Id.*

In reaching its holding, the *Wooten* court cited to *Viselli v. Missouri Theatre Bldg. Corp.*, 234 S.W.2d 563 (MO. 1950). In Viselli, the Supreme Court of Missouri held that Viselli, who was washing windows when he was injured, was a statutory employee of the owner of a commercial building because window washing was essential to maintaining the building in good condition. *Id.* at 567. The court pointed out that cleaning windows was part of the building owner's business, because the owner provided it to its tenants as a service along with electricity, heat, air conditioning, and janitor service. *Id.* The court thus held window washing was a customary and essential part of the building owner's business. *Id.* The *Wooten* court distinguished Viselli, finding that in contrast to the building owner's responsibility to its tenants to provide window cleaning, it was not an integral part of Youthcraft's business to furnish janitorial service. *Wooten*, 312 S.W.2d at 3.

We look to the particular facts of the case before us to determine whether there was substantial evidence from which the jury could reasonably conclude that the activity performed by decedent was outside the scope of National's usual business. Unless there is no room for a reasonable difference in judgment, the question of "usual business" is one for the jury. *Dunn v. General Motors Corp.*, 466 S.W.2d 700, 705 (Mo. 1971).

Here, there was substantial evidence that decedent performed the specialized work of scrubbing and buffing the floor, and of stripping and waxing it. When he scrubbed and buffed the floor, he used a propane-powered buffer owned, not by National, but by BBI. National employees at the store did not

use, any were not trained to use, the buffer. Decedent did not work in conjunction with National's own employees when he scrubbed and buffed the floor; and National employees did not perform these same functions. Compare McGuire, 756 S.W.2d at 533 (temporary worker hired as "sorter" was a statutory employee where other "sorters" worked at the plant and performed the identical task of sweeping the floor as one of their duties). Decedent worked during the night when the store was closed to the public, so that his work would not interfere with the day-to-day operation of the store. *See Wooten*, 312 S.W.2d at 3. He did not perform routine, general cleaning, the type of cleaning performed by National employees during the day. His job specifically included scrubbing and buffing the floor, utilizing a@particular program of floor care with several defined steps. It is inconclusive that at the time he was killed he may have been merely sweeping the floor, because that was a requisite step in the PEP program of floor care.

In addition, there was evidence that decedent was stripping the floor at the store on the night of his death. The process of stripping required special chemicals and utilized the machinery in a particular fashion. Stripping was done only periodically. Stripping was therefore a specialized job, not routinely performed by National's in-house employees.

From these facts and the inferences therefrom, a jury reasonably could conclude that the nature of decedent's duties did not warrant his characterization as a statutory employee. The trial court improperly granted judgment n.o.v. in favor of National. Plaintiffs' point on appeal is granted.

National raises several claims of error relative to the trial court's failure to grant its motion for new trial. *See* Rule 72.01(b). Its post-trial motion requested judgment notwithstanding the verdict or, in the alternative, a new trial.

National first charges error in the trial court's submission of plaintiffs' verdict directing instruction to the jury over its

objection. Plaintiffs' verdict director was patterned on MAI 22.02 [1991 Revision) and read as follows:

INSTRUCTION NO. 7

Your verdict must be for plaintiffs if you believe:

First, there was a danger that a worker would be attacked in the defendant's supermarket, and as a result, the supermarket was not reasonably safe, and

Second, Defendant knew or by using ordinary care should have known of this condition, and

Third, Defendant failed to use ordinary care to make the supermarket reasonably safe, and

Fourth, such failure directly caused or directly contributed co cause the death of Kenneth Bass.

National initially contends that the word "danger" in the instruction should be defined, because it is technical and susceptible to various interpretations. A trial court must define for the jury legal or technical terms occurring in the instructions. *Kline v. Bourbon Woods, Inc.*, 684 S.W.2d 938, 940 (Mo. App. 1985).

MAI does not require a definition of "danger." To provide such a definition would constitute a deviation from the approved instructions. In addition, National voiced an objection to the instruction at the conference, but did not request or offer a more specific instruction. Having failed to do so, it cannot now complain on appeal. *See Kline*, 684 S.W.2d at 941.

National also challenges plaintiffs, modification of the verdict directing instruction pursuant to MAI 19-01 [1986 Revision] for multiple causes of damage. Plaintiffs employed the first alternate of MAI 19-01 in drafting Paragraph 4 of their

verdict director, because plaintiffs considered the company which provided security to the store and the robbers who killed decedent to be other tortfeasors.

The Notes on Use (1995 Revision) state that "[t]hese modifications may be used whether or not another causing damage is a party." The Committee Comment (1995 New) states that the modification reflects the principles that a defendant is liable, although his negligence was not the sole negligence or the sole proximate cause, and although his negligence, without such other independent, intervening cause, would not have produced the injury. *See Gaines v. Property Servicing Co.*, 276 S.W.2d 169, 173-174 (Mo. 1955). In addition, it is proper to apply the MAI 19.01 modifications to a verdict director in a wrongful death action. *Honey v. Barnes Hosp.*, 708 S.W.2d 686, 693-694 (Mo. App. 1986). There was no error in plaintiffs, using the MAI 19-01 modifier on their verdict directing instruction. National's first point is denied.

National's second claim of error is that the trial court erred in admitting a photograph of decedent holding his one year old son, Christopher, who was dressed in a Santa Claus suit. National claims that the photograph was not instructive on any issue and only served to inflame the jury.

Admission of demonstrative evidence, such as photographs, is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Biller by Summers v. Big John Tree Transplanter Mfg.* and Truck Sales, Inc., 795 S.W.2d 630, 635 (Mo. App. 1990). To be admissible, evidence must be relevant or have a tendency to prove an issue on which it is offered; and whether evidence is relevant is largely committed to the discretion of the trial court. *Id.*

In the instant action, the challenged photograph was relevant to establish plaintiff-mother's claim that as a result of decedent's death, her plaintiffs-sons, Christopher and Maurice,

were deprived of the opportunity to be raised by their father and to experience his companionship. Photographs depicting the relationship between the decedent and his son were relevant to demonstrate the impact of decedent's death upon his young child. *See Biller*, 795 S.W.2d at 635 (admission of videotape of deceased worker and son playing was relevant to show their close relationship). The trial court did not abuse its discretion in admitting the photograph. National's second point is denied.

Finally, National asserts error in the trial court's permitting plaintiffs' counsel to comment during closing argument about a "technicality in the law" regarding whether decedent was National's statutory employee. National did not object to the statements of plaintiffs' counsel at the time they were made.

Generally, failure to object to an argument or statement at the time it is made to a jury results in a waiver of any right to complain about the statement on appeal. *Glasscock v. Miller*, 720 S.W.2d 771, 777 (Mo. App. 1986). If no objection is made, the trial court does not have an opportunity to take corrective action. *Id.* Although plain error review is available under Rule 84.13(c), the plain error rule should be invoked only in circumstances which demonstrate manifest injustice or a miscarriage of justice. *Id.*

An examination of plaintiffs, entire closing argument indicates that counsel's statements did not work any manifest injustice to National. Further, it is difficult to find any prejudice to National when National's counsel himself in closing argument referred to the "legal technicality of a statutory employee/ employer relationship." National's third point is denied.

The judgment of the trial court is reversed and the cause remanded with instructions to enter judgment in favor of plaintiffs in accordance with the jury verdict.

/s/ William J. Crandall, Jr., Judge
William H . Crandall, Jr., Judge

Kathianne Knaup Crane, P.J. and Robert G. Dowd, Jr., J.:
Concurs

APPENDIX F

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(St. Louis City)

No. 882-01425
Division No. 10

LOUISE BASS, surviving spouse of KENNETH BASS,
and MAURICE BASS and CHRISTOPHER BASS,
Surviving Children of KENNETH BASS, Deceased

Plaintiffs,

v.

NATIONAL SUPER MARKETS, INC.

Defendant.

MEMORANDUM ORDER

This cause comes on before the Court on Defendant's Motion for Judgment Notwithstanding the Verdict or, in the alternative, Motion for a New Trial. The Court, having considered the premises, arguments of counsel, and memoranda filed, hereby enters the following Order.

The Court concludes that Defendant's first ground for judgment notwithstanding the verdict is dispositive. § 287.040.1 RSMO establishes three criteria which must be met for statutory employment: 1) the work must be done pursuant to a contract; 2) that the work be performed on or about the premises of the alleged statutory employer's business; and 3) that the injury occur while work is being performed in the usual course of the statutory employer's business. *See, too, McGuire v. Tenneco, Inc.*, 756

S.W.2d 532, 534 (Mo.banc 1988); and *McDonald v. Bi-State Development Agency*, 786 S.W.2d 201 (Mo.App.E.D. 1990). It is the third element at issue, and the Court will limit its analysis to that element.

Defendant was required, by federal, state and local authorities, to maintain the cleanliness of its stores. As was the situation in *Shaver v. First Union Realty Management, Inc.*, 713 S.W.2d 297 (Mo.App.S.D. 1986), the Court finds and concludes that the tasks which Mr. Bass performed would have been done by Defendant Is own employees if not. done by Mr. Bass (or someone else sent by his immediate employer) . Janitorial services, such as those performed by Plaintiffs' decedent, were part of the usual business of Defendant. Therefore, the (court believes it is compelled to conclude as a matter of law, under current authority, that Mr. Bass was a statutory employee of National Super Markets.

The Court further notes that in Shaver, the court of appeals held that the appropriate vehicle for asserting the exclusivity of remedy under the Workers' Compensation Act is through a motion to dismiss for lack of subject matter jurisdiction. In addition, the court noted that such a dismissal is without prejudice, as the trial court was without jurisdiction to address the merits. *See Shaver*, 713 S.W.2d at 300. It is on this basis that the Court herein grants Defendant's motion.

The Court has fully considered all other grounds raised in Defendant's Motions. The Court finds and concludes that the other assertions of error are without merit, and further states that they are not well-taken. Both parties received an eminently fair trial. The Court specifically notes that Defendant was not limited in any way from presenting its case and theories to the jury, and the Court believes that each of those theories was fully and fairly presented to the jury for its determination. The jury considered all the circumstances, and rendered its verdict. The verdict was more than amply supported by the evidence, and but for the Court's belief that it is constrained to conclude as a matter of law

that Mr. Bass was a statutory employee and the Court therefore was without subject matter jurisdiction, the Court would not disturb the jury's findings and the verdict would be permitted to stand.

WHEREFORE the Court ORDERS, ADJUDGES and DECREES that Defendant's Motion for Judgment Notwithstanding the Verdict be and is hereby GRANTED on the basis that Plaintiff's exclusive remedy, as a statutory employee of Defendant, was through the Workers' Compensation Act, as a matter of law. The action is therefore DISMISSED WITHOUT PREJUDICE for lack of subject matter jurisdiction. Defendant's motion is hereby DENIED on all other grounds, as they are without merit.

The Court has considered all grounds alleged in Defendant's Motion for New Trial. That motion is hereby DENIED in all respects.

SO ORDERED:

/s/ Timothy J. Wilson
TIMOTHY J. WILSON, Judge

Dated: November 24, 1993

cc: Counsel of Record

(2)

No. 95-1505

Supreme Court, U.S.
FILED
APR 19 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

LOUISE BASS, Surviving Spouse of KENNETH BASS, Deceased, MAURICE BASS and CHRISTOPHER BASS,

Petitioners,

vs.

NATIONAL SUPER MARKETS, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Missouri

RESPONDENT'S BRIEF IN OPPOSITION

RONALD C. WILLENBROCK
Counsel of Record
AMELUNG, WULFF
& WILLENBROCK, P.C.
Attorneys for Respondent
515 Olive Street
Suite 1700
St. Louis, Missouri 63101
(314) 436-6757

8694
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

23pp

QUESTIONS PRESENTED FOR REVIEW

The following questions, rather than the questions identified by the petitioners, would be presented for review in this case:

1. Whether this Court is without jurisdiction to review petitioners' petition for writ of certiorari in that the two (2) questions presented for review in the petition were never presented to the Missouri courts. These questions were first raised in petitioners' Motion for Rehearing to the Missouri Supreme Court after its opinion.

2. Whether there is a true federal question raised by the Missouri Supreme Court's opinion in question (Appendix D to the petition) for it does not state any "new law".

3. Whether the Missouri Supreme Court improperly deprived the petitioners of their right to a jury trial.

4. Whether the Missouri Supreme Court should have given its decision prospective-only application.

LIST OF INTERESTED PARTIES

The petitioners are Louise Bass, Surviving Spouse of Kenneth Bass, Deceased, Maurice Bass and Christopher Bass.

The respondent is correctly identified in the caption except that National Super Markets, Inc. is now in voluntary liquidation and its parent company is National Tea Company, Inc.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Interested Parties	ii
Table of Contents	iii
Table of Citations	iv
Statement of Jurisdiction	1
Statement of the Case	1
A. Course of Proceedings and Disposition Below	1
B. Corrections of Misstatements in the Petition	3
Reasons for Denying the Writ	12
I. The Missouri Supreme Court did not improperly deprive the petitioners of their right to a jury trial.	14
II. The Missouri Supreme Court should not and could not give its decision prospective-only application for to do so would have deprived the respondent of its procedural due process, since its opinion does not establish a "new principal of law."	15
Conclusion	17

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Beck v. Washington, 369 U.S. 541 (1962) 12, 14

Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971) 16

Herndon v. Georgia, 295 U.S. 441 (1935) 12, 14

Kemper v. Glick, 39 S.W. 2d 330 (Mo. banc 1934), *cert. denied*, 52 S. Ct. 29, 284 U.S. 649, 76 L. Ed. 551 15

Killian v. J & J Installers, Inc., 802 S.W. 2d (Mo. banc 1991) 15

Leahy v. Leahy, 858 S.W. 2d 221 (Mo. banc 1993) 14

McGuire v. Tenneco, 756 S.W. 2d 532 (Mo. banc 1988) . 17

Summers v. Summers, 707 S.W. 2d 720 (Mo. banc 1985) 16

Thurston v. Ballinger, 884 S.W. 2d (Mo. App. 1994) ... 16

Yee v. City of Escondido, 503 U.S. 519 (1992) 12, 14

Statutes Cited:

28 U.S.C. § 1257 ..... 12, 14

Contents

	Page
28 U.S.C. § 1257(a)	1
R.S. Mo. § 287.010, *et seq.*	1
R.S. Mo. § 287.040	1
R.S. Mo. § 287.040.1	16
R.S. Mo. § 287.040.1, *et seq.*	17
United States Constitution Cited:	
Seventh Amendment	13
Fourteenth Amendment	13

Respondent requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the Missouri Supreme Court. The opinion of the Missouri Supreme Court is reported at 911 S.W.2d 617 (Mo. banc, petition for rehearing denied, December 18, 1995). (For the convenience of the Court, all citations to the opinion will be to the opinion attached as Appendix D to the petition.)

STATEMENT OF JURISDICTION

This Court cannot properly exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). The two (2) questions presented for review in the petition were never presented to the Missouri courts. These questions were first raised in petitioners' motion for rehearing to the Missouri Supreme Court after its opinion. There is no true federal question raised, nor did the Missouri Supreme Court's opinion in question (Appendix D to the petition) state any "new law".

STATEMENT OF THE CASE

Respondent respectfully opposes the petition for writ of certiorari. The facts of this case together with the Missouri Supreme Court's interpretation of Missouri R.S. § 287.040 (1994) (Missouri Workers' Compensation Act) raises no constitutional questions not already answered.

A. Course of Proceedings and Disposition of the Case Below

Petitioners filed their wrongful death action against the respondent and others in 1988, after petitioners had filed a Workers' compensation claim pursuant to the Missouri Workers' Compensation Act, § 287.010 *et seq.* Respondent, from the outset contended that the petitioners' sole remedy was the benefits payable under the Missouri Workers' Compensation Act, since the decedent as a "Statutory Employee" of respondent

pursuant to the Missouri Workers' Compensation Act. The initial pleading filed by the respondent was its motion to dismiss for failure to state a claim. This was overruled by the Circuit Court.

Later, after the petitioners had received the benefits due them under the Missouri Workers' Compensation Act, and discovery completed, the respondent filed its Motion for Summary Judgment citing the petitioners' sole remedy under Missouri law was the benefits payable under the Missouri Workers' Compensation Act. This was overruled by the circuit court (after it had sustained an identical Motion for Summary Judgment as to an identical claim by the widow of the security guard who also was killed during the robbery).

The case proceeded to trial. At the conclusion of the petitioners' case, respondent filed its Motion for a Directed Verdict, among other items the motion stated that the petitioners' claim was barred by the Missouri Workers' Compensation Act. This Motion for a Directed Verdict at the close of the petitioners' case was denied. Respondent then presented its case and at the conclusion of all the evidence the respondent filed its Motion for a Directed Verdict at the close of all the evidence, among other items the motion stated that the petitioners' claim was barred by the Missouri Workers' Compensation Act. This motion also, was denied.

The jury returned a verdict against the respondent. Within the time allowed by the Missouri Rules of Civil Procedure, respondent file its Motion for Judgment Notwithstanding the Verdict (hereinafter referred to as "JNOV"). This motion was sustained. The trial court found that the petitioners' cause of action was barred because of the Missouri Workers' Compensation Act, the decedent was a "Statutory Employee" of the respondent's and therefore petitioners' sole remedy was the

benefits already paid to the petitioners under the Missouri Workers' Compensation Act.

Petitioners appealed the trial court's granting of the JNOV to the Missouri Court of Appeals, Eastern District (*see* Appendix E to the petition). Missouri Court of Appeals, Eastern District Division Three, set aside the trial court's granting of the JNOV to respondent, and reinstated the jury's verdict in favor of the petitioners. Respondent, before the Missouri Court of Appeals, Eastern District, sought a rehearing or transfer to the Missouri Supreme Court, the Missouri Court of Appeals, Eastern District, denied rehearing or to transfer to the Missouri Supreme Court. Respondent requested the Missouri Supreme Court to accept transfer, which they did. The Missouri Supreme Court, (*en banc*) handed down their opinion (*see* Appendix D to the petition) on November 21, 1995 sustaining the trial court's granting of the JNOV to respondent.

Petitioners filed their Motion for Rehearing before the Missouri Supreme Court, December 6, 1995, (*See* Appendix "B") which motion was denied December 19, 1995. (*See* Appendix A to petition).

B. Corrections of Misstatements in the Petition

Respondent is dissatisfied with petitioner's statement of the case and therefore provides the Court with the following:

Petitioners' Statement of the Case is divided into two parts. The first part, "Failure to Provide Adequate Security" is irrelevant to the issues raised in petitioners' petition for writ of certiorari. Accordingly, respondent will not address this section of petitioners' Statement of the Case. Respondent notes herein that petitioners' factual summary misstates several aspects of the evidence at trial. Petitioners' Statement of the Case factually

misstates the testimony that respondent "deviated from its security procedure(s)" when they stated:

> [O]n the night in question, Defendant deviated from this [security] procedure.

A review of the testimony establishes that there was no "deviation" in the "security procedure."

The Deceased was a "Statutory Employee" of respondent. (In addition to the $165,000 distributed to petitioners from co-defendant Barrington Bryce Detective Agency as settlement, petitioners also receive weekly workers' compensation benefits from Building Butlers, Inc.)

The second part of petitioners' Statement of the Case deals with the "The Statutory Employee Defense." Petitioners assert that Bass was employed to perform "specialized" polishing, buffing, and stripping services at the Natural Bridge store. Arthur Seise owned Building Butlers, the janitorial company that provided services to the respondent's Natural Bridge Store.

Seise described the service as "nightly floor service, that is we dust mopped the floor and scrubbed the floors with an automatic scrubber" and buffed the floor with a high speed propane buffer. BBI would "periodically" strip and wax the floors. The "specialized" service to which petitioners cite is the Pioneer Eclipse Program ("PEP"). Seise described the PEP as a line of chemicals and waxes and a line of propane buffers that the PEP company manufactures for supermarkets and sells to distributors throughout the country. This "specialized" PEP was the program National required BBI to utilize in the Natural Bridge store. Seise was aware that, during the time BBI was servicing the Natural Bridge National store, National used the PEP in all its stores regardless as to whether National's

employees or a contractor performed the janitorial services. BBI provided services to the Natural Bridge store from August, 1986 through the middle of 1988, including the date of this incident.

Seise used the PEP during the entire time Building Butlers worked at the National store. PEP is just one kind of floor service program that a company or janitorial service can use to keep the floors clean for the public.

The only item BBI provided to perform the janitorial service was the propane buffer that was stored on National premises, and BBI replaced the pads on the buffer and provide fuel. National supplied everything else to BBI relative to BBI being able to perform the job at the Natural Bridge store. National supplied all of the PEP cleaning materials (*i.e.*, neutral cleaner, wax, finishing liquids), and all the cleaning utensils such as dust mops and brooms. National owned the auto scrubber, which was a machine utilized by Bass or others to clean the floors. The propane buffer was stored at the Natural Bridge store.

On the night of the incident, Bass was not there for the purposes of stripping the floor. Bass was there to do something that National normally had BBI do each night which was to sweep, mop and buff. In other words, Bass performed the "regular or nightly maintenance." Seise usually had one person assigned to the Natural Bridge store. Bass was the one person permanently assigned to the Natural Bridge store. During the period surrounding the time of the incident, National would have one of BBI's personnel, in this instance Bass, come to the store each night. No one from BBI supervised Bass.

Stripping and waxing was not something that is out of the ordinary as far as floor maintenance is concerned. Based on Seise's experience, National would have its floors stripped and waxed every six to nine months. BBI would strip the floor at

National's request. When stripping, BBI had a crew of 4-5 people over a 3-4 night period.

Once every 5-8 days National or BBI applied a "restorer" to heavy traffic areas, and once every two weeks it waxed heavy traffic areas.

National had the right to direct and replace Bass.

Seise testified that, somehow cleaning had to get done at the 24 hour stores. In 24 hour supermarkets like Price Chopper, since cleaning activities need to be done to the store such as dust mopping, wet mopping, and buffing, the cleaning is done at some point during the 24 hours.

Seise testified that National employees cleaned the floors during the day.

Seise's training of his employees to do the job involved of the lead man or supervisor working with the employees for a couple of evenings to go through "the regular nightly maintenance work" with the scrubber, using the product, demonstrating how to hook up the buffer. Seise had nothing to do with the training of National employees who performed Bass' job at its other stores.

After arriving at the Natural Bridge store, Bass would do the following on a daily basis: 1) sweep the entire sales floor; 2) dust mop the store picking up labels or gum on the floor with a razor blade; 3) place the floor soaps into the auto scrubber and scrub the floor; 4) perhaps incidental spot mopping; and 5) run the propane after the floor dried. Based upon Seise's experience, this daily process was accomplished at the Natural Bridge store when the store is closed to the public.

At the time of the incident, the Natural Bridge store had three "porters", two during the day and one at night. The night person was with the janitorial service. The day porter would dust mop and wet mop the floor. The cleaning equipment for the floors, stored at National, included mops, brooms, scrub machines, and the cleaning supplies. Other than the buffer, the day porters used all of the equipment.

Co-manager, Joe Lenoir would tell the janitors from BBI of any special cleaning he wanted done other than the "norm."

Dan Hughes, Vice President, Smith-Scharff, sold the PEP to retailers such as National. The PEP floor care system consists of five components-the floor finish, floor sealer, neutral cleaner, restoration, and a floor stripper or floor finish remover. The "program" consists of products and the steps to apply the "program." The only component considered to have causticity is the floor stripper. If used properly, there should be no exposure to the product.

Hughes testified to the daily, weekly, monthly, and yearly maintenance and reviewed the steps of each. The "yearly" maintenance actually varied and 6-8 uses per year is normal in the grocery industry because of the foot traffic. The daily maintenance involves sweeping the floor, removing gum and stickers, cleaning with the auto scrubber, and buffing. All the steps of the daily maintenance are necessary to perform the program and are "integral" to the process, including sweeping and mopping.

National purchases all of its cleaning products from Smith-Scharff. Since 1984, National purchased from Smith-Scharff all of the floor cleaning products and equipment for the PEP from Smith-Scharff for all of its stores.

There are other companies that Smith-Scharff distributes for that have similar floor care programs to the PEP. Hughes has sold the PEP to National's competitors like Schnuck's and Dierberg's and Shop-N-Save. It is the custom in the supermarket industry to do the four step daily maintenance when the store is closed to the public, if possible, so as not to interfere with customers. National uses the PEP products and equipment on the floor during the day.

Schnucks and Dierberg's used its own in-house employees to apply the PEP. Hughes participated in the training of the Schnuck's and Dierberg's employees as to how to apply the PEP. Like National, Shop-N-Save used both its own in-house employees and janitorial services and participated in the training of the Shop-N-Save employees regarding how to apply the PEP.

National purchased an average of 5-8 auto scrubbers per year at a cost of $6,000 to $6,500 per scrubber. National also bought buffers from Smith-Scharff.

Anthony Summers was the Store Services Manager at National from 1982 through at least the time of the incident. Summers' duties consisted of, among other things, hiring the floor cleaning contractors and obtaining the chemicals and products used for cleaning the stores' floors. During that time, Missouri regulations existed regarding cleaning the floors in the stores in order to sell groceries in Missouri which National had to follow. Summers identified Department of Health Regulations governing sanitation of retail stores, which included a section regarding sanitation of floors. It was Summers' job to make sure National followed those rules. Summers also confirmed that National had to comply with the Department of Health rules, paragraph 23, which provides:

> Cleaning of floors, walls and ceilings shall be done as often as necessary but preferably during periods when the least amount of food is exposed such as after business hours. Only dustless methods of cleaning floors, walls and ceiling shall be used such as vacuum cleaning, wet cleaning, treated dust mops or the use of dust arresting sweeping compounds with brooms.

From 1982 through the date of the incident, representatives of the State of Missouri inspected National's stores to see if National complied with the regulations.

National also had to comply with Section 7-301, page 44, of the "Retail Food Stores Sanitation Code promulgated by United States Department of Health and Human Services," which provides:

> Cleaning of floors, walls and ceilings shall be done as often . . .

Summers was responsible for National starting to use the Pioneer Eclipse Program throughout its stores. The means of application of the PEP was the same as compared to what National was using with its own people before the changeover. Between 1982 and 1984, National essentially used the same program as PEP to clean its floors, including the type of chemicals and methods of application. The company through which it purchased the chemicals/products was Dart Research. Prior to using PEP, National's employees used a propane buffer in some of its stores, and National's employees used auto scrubbers, dust mops, and wet mops to clean the floors of its stores. National did not have to make a change in the purchasing of any equipment it already had to use for the Dart Research

chemicals when it adopted and switched to the PEP. Summers identified the form the store managers used to order the floor cleaning supplies and products on the date of the incident, and explained the procedure the managers used to order said items directly from Smith-Scharff. In 1987, no difference existed between the supplies, products, and equipment National supplied to the Natural Bridge store as compared to the other stores, and no difference existed (other than brand name) between the supplies, products and equipment National ordered in 1987 as compared to when using Dart Research. National provided to all the stores cleaning items, such as brooms, mop buckets, wringers for the mop buckets, rayon and cotton mops with handles, various pads for the auto scrubber, edging tools, doodle bugs or octopus pads and handles, and the PEP neutral cleaner, stripper, floor finish or restoration to all stores. In 1987, National owned auto scrubbers that were stored on the stores' premises. In the eleven stores in which National employees cleaned the floors overnight the National employees used buffers owned by National.

During the day, National's porters would sweep, dust mop and wet mop any spills or breakages. With respect to cleaning the floors during the day, the procedure at the Natural Bridge store was the same as in all other National stores.

Summers is the National representative that contracted with BBI to clean the floors of the Natural Bridge store overnight. National required BBI to use the PEP. BBI could not have decided on its own to use another program. National provided everything necessary, except the buffer, the pads and fuel for the buffer, and maintenance of the buffer. Any managerial employee of National had the authority to instruct the BBI employees, and request that BBI replace an employee.

Harold Meyer was manager of the Natural Bridge store and

was on duty at the time of the incident. BBI was the cleaning service that performed work at the Natural Bridge store after store the store was closed to the public. BBI would call the manager to tell him if a different employee was arriving to the Natural Bridge store to perform the services. The usual custom was to have one night man from BBI. The one "night man" from BBI, at the Natural Bridge store, was Bass on the date of the incident.

The stock clerks would also work at the Natural Bridge store overnight, and three stock clerks were working the night of the incident. Immediately before the incident occurred, Bass was pushing a broom down the dairy aisle. There was no one else present at the store from BBI. Bass was there to clean the floor. Meyer described the procedure Bass followed for the daily maintenance. This was the procedure Bass was to follow every time he was at the Natural Bridge store. If Meyer saw an area that was being neglected, Meyer informed Art Seise. Everyday, Meyer knew what was going on with the floor. It was common for Meyer to instruct the BBI person regarding certain tasks Meyer wanted done, *i.e.*, cleaning areas of the floor where an item had spilled that would stain the floor, pointing out floor corners that were dirty, Meyer testified he "was always on them pointing out certain areas for cleaning." Meyer did not give Bass any instructions that evening regarding the floor cleaning.

Before this incident, Meyer had the right to tell a BBI employee to the leave the store. Meyer had an occasion to tell a BBI employee to leave. Meyer would tell Art Seise if he did not want a certain person from BBI returning to the store.

Pursuant to the contract with BBI, BBI was to clean the floor of the store on a "regular daily basis." BBI normally sent one person to the Natural Bridge store. National owned an auto scrubber that it kept on the premises.

Meyer kept dust mops, brooms, wet mops, and other forms of cleaning materials stored on the premises of the Natural Bridge store. National's employees on duty during the day would sweep, dust mop and wet mop the floor of the Natural Bridge store "all the time."

During the eight years Meyer was manager of the O'Fallon National store, and during the time Meyer was manager of the Natural Bridge National store, Meyer had National employees who cleaned and swept the floors. During the time Meyer was manager, co-manager or assistant manager at various National stores, Meyer had locations in which, after closing but before opening the store to the public, the floors would be waxed, stripped, cleaned every night, and mopped by National employees. The employees would also use the scrubbers. At other times at other stores, the overnight floor cleaning was contracted out to a janitorial service. From the time Meyer became Assistant Manager to the date of the incident, over eight years, the floors at the various National stores Meyer worked at were always cleaned the same way whether a National employee or a contract janitorial service preformed the cleaning, including the procedures and types of materials utilized.

REASONS FOR DENYING THE WRIT

This Court refuses to review judgments rendered by the highest court of a state unless a federal question has been both raised and decided in the state court below. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing judgments of the state courts under 28 U.S.C § 1257, the Court will refuse to consider claims that were not raised or addressed below). *See also Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (because petitioner failed to argue equal protection in state court, question was not before this Court); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (failure to follow appellate channels provided by state court is fatal).

Missouri law is consistent with federal law: arguments not presented to the trial court cannot be presented in the court of appeals or before the Missouri Supreme Court.

In this Court, for the first time, petitioners argue that they have been denied their Seventh Amendment right to trial by jury and Fourteenth Amendment right of due process. Petitioners never cited the Seventh Amendment nor the Fourteenth Amendment to the trial court, the Missouri court of appeals nor to the Missouri Supreme Court. Their only cite, to the above amendments, was in their December 6, 1995 motion for rehearing to the Missouri Supreme Court, after its final (*en banc*) decision of November 21, 1995.

Petitioners' petition for writ of certiorari to this Court attempts to set out two (2) reasons this Court should grant its writ of certiorari:

> (1) THE UNITED STATES SUPREME COURT IS VIGILANT TO EXERCISE ITS POWERS OF REVIEW IN ANY CASE WHERE IT APPEARS THAT THE LITIGANTS HAVE BEEN IMPROPERLY DEPRIVED OF THEIR RIGHT TO A JURY DETERMINATION AND SUBSTANTIVE AND PROCEDURAL DUE PROCESS.
>
> (2) THE MISSOURI SUPREME COURT SHOULD HAVE GIVEN ITS DECISION PROSPECTIVE-ONLY APPLICATION TO AVERT INJUSTICE, AND PROCEDURAL DUE PROCESS; AND ITS OPINION IS IN CONFLICT WITH THIS COURT'S THREE-FACTOR TEST ANNOUNCED IN *CHEVRON OIL CO. V. HUDSON* . . .

I.

THE MISSOURI SUPREME COURT DID NOT IMPROPERLY DEPRIVE THE PETITIONERS OF THEIR RIGHT TO A JURY TRIAL.

Petitioners first point **"THE UNITED STATES SUPREME COURT IS VIGILANT TO EXERCISE ITS POWERS OF REVIEW IN ANY CASE WHERE IT APPEARS THAT THE LITIGANTS HAVE BEEN IMPROPERLY DEPRIVED OF THEIR RIGHT TO A JURY DETERMINATION AND SUBSTANTIVE AND PROCEDURAL DUE PROCESS."** This is a misplaced "last gasp" attempt to raise a "red herring" issue to "postpone the inevitable."

No constitutional issue is preserved for appeal unless it is raised at the earliest possible time. *Yee v. City of Escondido*, 503 U.S. 519, 523-33 (1992) (in reviewing judgments of the state courts under 28 U.S.C § 1257, the Court will refuse to consider claims that were not raised or addressed below). *See also Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (because petitioner failed to argue equal protection in state court, question was not before this Court); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935) (failure to follow appellate channels provided by state court is fatal); *Leahy v. Leahy*, 858 S.W. 2d 221 (Mo. banc 1993)

Petitioners' "earliest possible time" to have raised any constitutional issues would have been at the time they filed their notice of appeal from the trial judge's granting of the JNOV.

Petitioners briefed this matter in the Missouri Court of Appeals, Eastern District and did not raise any constitutional issues.

Petitioners, after transfer was granted to the Missouri Supreme Court, rebriefed this matter and raised no constitutional issues.

The first time petitioners raised any constitutional issues was in their Motion for Rehearing after the Missouri Supreme Court's opinion was handed down. Clearly, petitioners have waived any constitutional questions. *Killian v. J & J Installers, Inc.*, 802 S.W. 2d 158 (Mo. banc 1991).

These constitutional issues, however, have already been decided. The Missouri Supreme Court was faced with the constitutional issues petitioners now wish to "revisit." In *Kemper v. Glick*, 39 S.W. 2d 330, (Mo. banc 1934), *cert. denied*, 52 S. Ct. 29, 284 U.S. 649, 76 L. Ed. 551, the Missouri Supreme Court held that the constitutional question(s) whether the Missouri Workers' Compensation Act takes away common-law rights of action and defenses can only arise where there were constitutional guarantees of such rights and would be violated by their infringement.

II.

THE MISSOURI SUPREME COURT SHOULD NOT AND COULD NOT GIVE ITS DECISION PROSPECTIVE-ONLY APPLICATION FOR TO DO SO WOULD HAVE DEPRIVED THE RESPONDENT OF ITS PROCEDURAL DUE PROCESS, SINCE ITS OPINION DOES NOT ESTABLISH A "NEW PRINCIPAL OF LAW."

Petitioners' second point, **"THE MISSOURI SUPREME COURT SHOULD HAVE GIVEN ITS DECISION PROSPECTIVE-ONLY APPLICATION TO INVERT INJUSTICE, AND PROCEDURAL DUE PROCESS; . . ."**, is without merit. The Missouri Supreme Court's ruling (1) does not

establish a new principal of law by overruling clear past precedent; (2) the purpose and effect of the Missouri Supreme Court's decision would not be retarded by its retroactive application; and (3) there are no interests that must be balanced since there is no change in the law. Petitioners citing *Sumners v. Sumners,* 701 S.W. 2d 720, 722-23 (Mo. banc 1985) has no application to this case. *Sumners, supra,* sets forth the test to determine whether an overruling decision is to have retrospective effect. "At the threshold, however, before the retrospective application of the decision becomes an issue, it must be determined that it 'establish[es] a new principle of law . . . by overruling clear past precedent.' " *Id.* at 724, quoting *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106, 92 S. Ct. 349, 355, 30 L. Ed. 2d 296 (1971); *Thurston v. Ballinger,* 884 S.W. 2d 22, 25 (Mo. App. 1994).

Not to diminish the magnitude of or to take anything away from the Missouri Supreme Court's opinion in this case, it cannot be said to "establish[es] a new principle of law . . . by overruling clear past precedent."

The opinion cites a number of Missouri court decisions, both of the Missouri Supreme Court as well as opinions of the Missouri court of appeals, which have arrived at the same conclusion as to what is "usual business" and "usual course of business" as used in Missouri R.S. § 287.040.1 (1994). (*See* II, C pp. 6 to 9 of the opinion, petitioners' Appendix D).

CONCLUSION

The writ of certiorari should be denied. The Missouri Supreme Court's opinion correctly interpreted Missouri law, as set forth in Missouri R.S. § 287.040.1, *et seq.* (1994) and as set forth in earlier opinions by that court, as well as by the various decisions of the Missouri court of appeals, *e.g., McGuire v. Tenneco*, 756 S.W. 2d 532 (Mo. banc 1988), and properly applied that law to the facts of the case at hand. The decision "made no new law." The opinion did not deprive the petitioners of any guaranteed constitutional rights under the United States Constitution or the Constitution of the State of Missouri.

Respectfully submitted,

RONALD C. WILLENBROCK
Counsel of Record
AMELUNG, WULFF
& WILLENBROCK, P.C.
Attorneys for Respondent
515 Olive Street
Suite 1700
St. Louis, Missouri 63101
(314) 436-6757